Supreme Court, U. S.
FILED
DEC 30 1976
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-321

STENCEL AERO ENGINEERING CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONER

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Opinions Below

The opinion of the Court of Appeals (A. 36a) is reported at 536 F.2d 765. The opinion of the District Court (A. 32a) is reported at 395 F. Supp. 52.

Jurisdiction

The judgment of the Court of Appeals was entered June 4, 1976 (A. 7a, 36a). The petition was filed September 1, 1976 and was granted on November 15, 1976. (A. 56a). The jurisdiction of this Court rests upon 28 U.S.C. §1254(1).

Statute Involved

The statute involved is the Federal Tort Claims Act, (FTCA), 28 USC §1346(b) and §§2671-2680, the relevant provisions of which are:

28 USC §1346. UNITED STATES AS DEFENDANT

• • •

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

• • •

28 USC §2674. LIABILITY OF UNITED STATES

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages,

measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

Question Presented

Whether, pursuant to the Federal Tort Claims Act, 28 U.S.C. §2674, state law should be applied to determine the validity of a cause of action for indemnity brought against the United States by a private individual who ultimately may be held liable for personal injuries suffered by a government employee caused by the negligence of the United States?

Statement of the Case

On June 9, 1973, while on active duty for training with the Missouri Air National Guard, John Donham was injured in the process of ejecting from an F-100D Air Force aircraft over Missouri. (A. 9a-10a).

Donham then brought suit in the District Court for the Eastern District of Missouri against the United States, Stencel Aero Engineering Corporation (Stencel), petitioner herein, and others, claiming damages of $2,500,000. (A. 8a-11a). He claimed that his injuries were the result of a defect in the ejection system manufactured by Stencel and installed on the aircraft. Donham charged that the ejection system malfunctioned because of the "negligence and carelessness of the defendants (Stencel and the United States) individually and jointly". (A. 10a-11a).

Stencel then cross-claimed against the United States for indemnity asserting that if there was a defect in the ejection system it was due to the specifications, requirements and components provided by the United States. (A. 19a).

After issue was joined as to the complaint and the cross-claim and before any discovery was initiated, the United States moved for summary judgment against plaintiff Donham asserting that his injuries were sustained incident to his service and that *Feres* v. *United States,* 340 U.S. 135 (1950) barred the action. (A. 22a). The United States also moved to dismiss Stencel's cross-claim arguing that the existence of an exclusive system of compensation provided to Donham by the United States, as well as the decision in *Feres,* barred Stencel's action for indemnity against the United States. (A. 30a).

The District Court granted the motions of the United States and dismissed Donham's claim against the United States and Stencel's cross-claim for indemnity against the United States. (A. 32a-34a). The claim of Donham against Stencel, however, was not a part of the motion or decision of the District Court and remains pending against Stencel in the District Court.

The District Court held that *Feres* barred not only plaintiff Donham's claim against the United States, but also Stencel's cross-claim for indemnity against the United States because "to allow Stencel to recover against the United States on indemnity is to allow recovery indirectly of what could not be recovered by the injured plaintiff directly". (A. 33a).

The Order of the District Court was entered as a final judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure (A. 35a) and Stencel appealed to the United States Court of Appeals for the Eighth Circuit. Donham did not appeal.

The Court of Appeals affirmed the judgment of the District Court. The Court found that it was "inappropriate" to apply state law, as required by the FTCA, to a

claim involving the federal relationships existing between Donham and the United States and between Stencel and the United States, and concluded the Federal Tort Claims Act did not cover Stencel's claim for indemnity against the United States. (A. 36a-55a).

It is this decision of the Court of Appeals which is before the Court on this Petition.

Summary of Argument

In enacting the Federal Tort Claims Act (FTCA), the Congress in sweeping language waived the sovereign immunity of the United States from actions in tort and, with few exceptions, rendered the United States liable for its tortious acts to the same extent that a private person would be liable under the law of the place where the tortious acts occurred. 28 U.S.C. § 1346, §§ 2671-2680.

This case asks a single question: whether petitioner Stencel's claim is covered by the waiver of sovereign immunity contained in the FTCA.

In determining whether a claim is within the waiver of the FTCA, the Court has established as a basic rule of construction that the waiver is to be liberally construed and the exceptions to the waiver are to be narrowly construed. As its previous decisions disclose, this Court has followed a three-step process in determining whether a particular claim is covered by the waiver of the FTCA. First, the broad and sweeping language of the waiver is examined to determine whether the claim is within its terms; second, the listed exceptions to the FTCA are examined to determine if any apply to exclude the claim; third, the Court determines whether, in light of the broad waiver, there is any evidence that Congress did not intend to bring the claim within the purview of the FTCA.

In this process, this Court has also considered whether an FTCA remedy against the United States for the particular claim would fit within the existing system of remedies provided against the Government: if the claim is one for which Congress provided a remedy against the United States, it would be an indication that Congress did not intend the FTCA to cover the claim; if the claim is one for which there is no other remedy against the United States, the claim will be found covered by the FTCA, if within the language of the waiver.

Petitioner Stencel's claim in this case is a tort claim for indemnity against the United States based upon an implied-in-law contract of indemnity arising as a result of the negligence of the United States in its dealings with Stencel. When these considerations and this three-step process are applied to Stencel's claim, it is clear that Stencel's claim is covered by the waiver of sovereign immunity contained in the FTCA. The language of the Act is sufficiently broad to include Stencel's claim in indemnity for money damages based on the negligence of the United States in its dealings with Stencel. None of the thirteen listed exceptions apply to Stencel's claim. There is no evidence that Congress did not intend to include a claim for indemnity such as Stencel's within the coverage of the FTCA. In fact, there is evidence in the legislative history of an affirmative Congressional intent to include such a claim.

No other remedies against the United States are available to Stencel to redress damage suffered by Stencel as a result of the United States' negligent tortious conduct to it. If Stencel's claim is barred, Stencel will be left remediless against the United States.

Stencel's claim against the United States for indemnity therefore is clearly within the coverage of the FTCA.

The decision of the court below holding that the FTCA did not apply to petitioner Stencel's claim was based upon an "appropriateness" test contrary to the clear language and purpose of the FTCA that the United States shall be liable to the same extent as a private individual pursuant to applicable state law.

The court below found that, based upon the federal relationships between Donham and the United States and Stencel and the United States, it was inappropriate to apply state law as mandated by the FTCA and, therefore, that the FTCA does not apply to petitioner's claim.

The court below relied on and attempted to extend the decision in *Feres* v. *United States,* 340 U.S. 135 (1950). This Court's decision in *Feres* is irrelevant to Stencel's claim against the United States and has no applicability to the determination of whether the waiver in the FTCA covers petitioner's claim. None of the rationales that support the *Feres* decision would be furthered, even indirectly, by barring petitioner's claim. The *Feres* decision does not address the Stencel-United States relationship nor does it apply to the negligent acts of the United States committed against Stencel.

Donham's claim against Stencel is independent of Stencel's claim against the United States. His claim is fundamentally different and based on different sets of facts, legal theories, and acts of negligence. To extend *Feres* is to narrow the broad waiver of sovereign immunity contained in the FTCA, and broaden the *Feres* exception, contrary to this Court's basic rule of construction that the waiver be construed liberally, and the exceptions narrowly.

To ground the inapplicability of the FTCA upon the presence of federal relationships is to impose a limitation on the applicability of the FTCA which is contrary to the

plain language and purpose of the FTCA. Even if there were a basis for carving out a "federal relationship" exception, the concept of "federal relationship" is itself difficult, if not impossible, to define.

The FTCA, in its plain terms, provides a clear solution to the question of whether Stencel has a claim for indemnity against the United States under the Federal Tort Claims Act. The majority of the United States Courts of Appeals which have considered this question have found that the United States may be sued in tort indemnity and contribution according to applicable state law if a private person could be held so liable. More importantly, the Court in *Treadwell Construction Co.* v. *United States,* 372 U.S. 772 (1963), in its brief but clear remand, held that, notwithstanding that the government employees was barred from suing the United States, a third-party could recover indemnity against the United States if provided by applicable state law.

The decision of the court below was therefore contrary to the clear language and purpose of the FTCA that the United States shall be liable to the same extent as a private person under similar circumstances according to applicable state law. This requires a reversal of the judgment of the Court below, remanding the cause with instructions that the motion of the United States to dismiss the cross-claim should be denied.

I.

The Federal Tort Claims Act in Sweeping Language and With Few Exceptions Rendered the United States Liable for Its Tortious Acts to the Same Extent as a Private Person Would Be Liable Under the Law of the Place Where the Tortious Act Occurred.

In enacting the Federal Tort Claims Act[1] (FTCA), the Congress, in sweeping language waived the sovereign immunity of the United States from actions in tort and, with few exceptions, rendered the United States liable for its tortious acts to the same extent as a private person would be liable under the law of the place where the tortious act occurred, 28 USC §1346, §§2671-2680. *United States* v. *Yellow Cab Co.,* 340 U.S. 543 (1951).

As the Court stated in *Yellow Cab*:

> "Where a statute contains a clear and sweeping waiver of immunity from suit on all claims with certain well defined exceptions, resort to that rule [of strict construction] cannot be had in order to enlarge the exceptions." Employers Fire Ins. Co. v. United States, (CA 9th Cal) 167 F2d 655, 657.

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[1] The Federal Tort Claims Act was Title IV of the Legislative Reorganization Act of 1946, 60 Stat. 812, 842-47, Ch. 753, 28 U.S.C. (1946 Ed.) §921-946. Subsequently, in 1948, the Act was divided and reintegrated into Title 28 of the United States Code. Those changes, however, were not intended to alter the purpose, intent or substantive structure of the Act. For the purposes of evaluating the intent of Congress in waiving the Government's sovereign immunity, it is preferable to rely upon the original Act and petitioner will uniformly do so. See *United States* v. *Yellow Cab Co.,* 340 U.S. 543, 547 n.4.

340 U.S. at 548 n.5. *See also United States* v. *Aetna Casualty and Surety Company,* 338 U.S. 367 (1949). The Court further explained in *Yellow Cab*:

> "A sense of justice has brought a progressive relaxation by legislative enactments of the rigor of the immunity rule. As representative governments attempt to ameliorate inequalities as necessities will permit, prerogatives of the government yield to the needs of the citizen. . . . When authority is given, it is liberally construed." United States v. Shaw, 309 US 495, 501. . . .

340 U.S. at 554-55.

This holding emerged from a detailed study of past Congressional efforts to enact a bill waiving the Government's immunity in tort. Earlier bills were extremely particular and were designed to create and precisely delimit various causes of action which may be brought against the Government. As time went on, the bills became less and less specific, and in the early 1940's began to provide a broad waiver of sovereign immunity, with causes of action and defenses dependent on state law, with a few specific and listed exceptions. See *United States* v. *Yellow Cab Co.,* 340 U.S. 549-51 nn.6-8.

As a result of this development, the FTCA, as finally enacted in 1946, waived "the Government's immunity from suit in sweeping language". *United States* v. *Yellow Cab Co.,* 340 U.S. at 547. Consistent with the sweeping nature of the waiver, the Court concluded in *Yellow Cab* that the waiver should be liberally construed, and any exceptions to it should be narrowly construed.

Applying this rule of construction, the Court followed a three-step process for determining whether any particular claim is within the waiver of sovereign immunity:

(1) whether the claim is within the broad and sweeping language of the waiver;

(2) whether the claim is barred by any of the exceptions listed in the FTCA;

(3) whether, in light of the broad waiver, there is evidence that Congress did not intend to bring the particular claim within the purview of the FTCA.

In *Brooks* v. *United States,* 337 U.S. 49 (1949), this Court applied this three-step process in a suit by an off-duty serviceman for injuries sustained in an automobile accident with an army truck. The Court first looked to the terms of the waiver of sovereign immunity:

> The statute's terms are clear. They provide for District Court jurisdiction over *any* claim founded on negligence brought against the United States. We are not persuaded that "any claim" means "any claim but that of servicemen."

337 U.S. at 51.

Next the Court examined the exceptions to determine whether this claim was barred by the exceptions to the Act.

> None exclude petitioners' claims. One is for claims arising in a foreign country. A second excludes claims arising out of combatant activities of the military or naval forces, or the Coast Guard, during time of war.

337 U.S. at 51.

Finally, the Court considered whether or not there was evidence that Congress did not intend to bring the particular claim within the purview of the Act.

> It would be absurd to believe that Congress did not have the servicemen in mind in 1946, when this statute

was passed. The overseas and combatant activities exceptions make this plain.

337 U.S. at 51.

In a case dealing with a claim for contribution under the FTCA, *United States* v. *Yellow Cab Co., supra,* this Court similarly followed this three-step process:

> The words "*any claim* against the United States . . . *on account* of personal injury" (emphasis supplied) are broad words in common usage. They are not words of art. Section 421 lists 12 classes of claims to which the waiver shall not apply, but claims for contribution are not so listed.

340 U.S. at 548.

Not only did the Court find no evidence that Congress did not intend to bring the claim within the Act, but in fact found evidence that Congress intended to bring the claim within the Act. See *United States* v. *Yellow Cab Co.,* 340 U.S. at 550 n. 8.

Feres v. *United States,* 340 U.S. 135 (1950), decided during the same term as *Yellow Cab* initially appears anomalous in its treatment of the FTCA and appears to create an exception to the Act. Closer examination reveals, however, that this Court found evidence that Congress did not intend to include within the purview of the Act claims of on-duty servicemen for service-connected injuries.

> The primary purpose of the Act was to extend a remedy to those who had been without; if it incidentally benefitted those already well provided for, it appears to have been unintentional. Congress was suffering from no plague of private bills on the behalf of

> military and naval personnel, because a comprehensive system of relief had been authorized for them and their dependents by statute.

340 U.S. at 140. In addition to the finding that servicemen's claims were not within Congress' consideration, the Court found that the existence of this alternative remedy was persuasive evidence that the Congress had not intended to extend the FTCA remedy to on-duty servicemen.

Another example of the application of this three-step process is found in *Rayonier, Inc.* v. *United States,* 352 U.S. 315 (1957), where the Court found that the United States could be held liable under Washington law for negligent fire fighting. First the Court looked at the language of the Act and found the waiver broad enough to encompass these claims. 352 U.S. at 318.

Secondly, the Court examined the listed exceptions and determined them inapplicable. The Court stated:

> There is no justification for this court to read exemptions into the Act beyond those provided by Congress.

352 U.S. at 320.

The Court then found that there was no evidence that Congress intended to exclude the "novel and unprecedented governmental liability" of the United States for acts of Forest Service fire fighters. 352 U.S. at 319. The Court wrote:

> [T]he very purpose of the Tort Claims Act was to waive the Government's traditional all-encompassing immunity from tort actions and to establish novel and unprecedented governmental liability.

352 U.S. at 319

In all of these cases, the Court has also considered whether the claimant had a remedy against the United States alternative to the FTCA remedy. Where the claimant had no alternative remedy, the Court found that the claim was covered by the FTCA if it was within the language of the waiver. In *Rayonier,* for example, the Court noted that, absent the FTCA remedy, the claimant would be remediless. Said the Court:

> [W]hen the entire burden falls on the injured party it may leave him destitute or grievously harmed. Congress could, and apparently did, decide that this would be unfair . . . .

352 U.S. at 320. *Yellow Cab* expresses a similar concern at 340 U.S. 551-552. See also *United States* v. *Aetna Casualty and Surety Co.,* 338 U.S. at 383.

On the other hand when the Court found that the claimant has another remedy against the Government, the Court found this to be an indication that Congress did not intend the FTCA to cover the claim. In *Feres* the Court said:

> This Act, however, should be construed to fit, so far as will comport with its words, into the entire statutory system of remedies against the Government to make a workable, consistent and equitable whole.

340 U.S. at 139. The Court found that the serviceman's ample, quick and sure remedy made it unlikely that Congress intended to extend the FTCA remedy to him. Said the Court:

> If Congress had contemplated that this Tort Act would be held to apply in cases of this kind, it is difficult to see why it should have omitted any provision to adjust these two types of remedy [The Military Compensation Act remedy and the FTCA remedy] to each other. The absence of any such adjustment is persuasive that there was no awareness that the Act might be interpreted to permit recovery for injuries incident to military service.

340 U.S. at 144.

Thus, these cases reveal that where a claimant has an alternative remedy, it is indicative of a lack of Congressional intent to provide an FTCA remedy for the claim. On the other hand, where the claimant has no alternative remedy against the United States the Court has accorded great weight to its basic rule of liberally construing the sweeping language of the waiver and has found coverage, refusing thereby "to read exemptions into the Act beyond those provided by Congress." 352 U.S. at 320.

The decisions of the Court provide the guidelines for interpreting the waiver of sovereign immunity contained in the FTCA. They enunciate the basic rule of construction that the sweeping terms of the waiver should be construed liberally and the exceptions should be construed narrowly; they disclose a three-step process for determining whether a particular claim is within the FTCA waiver; and finally, they reveal that in construing the waiver, the Court considers whether the claimant has any alternative remedy against the Government.

II.

A Claim Against the United States for Indemnity to Recover Damages Caused by a Tortious Act of the United States, for Which a Private Individual May Be Held Liable to an Injured Party, Falls Within the Scope of the Federal Tort Claims Act.

A. *Petitioner Stencel's Claim Is a Tort Claim Based Upon an Implied-in-Law Contract of Indemnity Arising as the Result of the Government's Negligence in Its Dealings With Stencel.*

Stencel's claim in this action is an indemnity claim to recover damages for which it may be held liable by reason of the negligence of the United States in its dealings with Stencel. Stencel claims that if it is held liable to the plaintiff, John Donham, for a defect in the ejection system it manufactured, that defect was inherent in the specifications, requirements and components negligently provided by the Government. (A. 19a). The negligence for which Stencel seeks indemnity is the United States' negligence in its dealings with Stencel.

There is no question that had Donham been a civilian (a non-U.S. serviceman or a non-government employee), Stencel could state a valid claim against the Government in indemnity to the extent permitted by applicable state law. Had Donham's plummeting egress system killed or injured a private citizen on the ground, Stencel likewise could state a claim for indemnity under the FTCA, if held liable to the injured citizen.

This case, therefore, is a straightforward claim against the United States for damages resulting from the Government's negligence in its dealings with Stencel.

The court below, in its opinion, attempted to characterize the Stencel-United States relationship as a contractual one governed by federal law. (A. 41a). The indemnity on which Stencel bases its claim is not contractual in nature; rather, it arises out of the United States' negligent provision of defective specifications, requirements, and components. Under Missouri law, it would be an implied-in-law contractual indemnity. That is: on the basis of this relationship, the law implies an obligation of the United States to indemnify Stencel when the character of the negligence of the United States was such as to create Stencel's liability to someone else.

While the doctrine has its roots in traditional notions of contracts for indemnity, it is, in fact, an equitable doctrine for adjusting tortious relationships. Despite its designation as an implied-in-law contract of indemnity, it is a tort doctrine dependent upon traditional notions of negligence. The Court of Claims, in administering the Court of Claims Act, 28 U.S.C. §1491, has long recognized the distinction between "implied-in-law" and "implied-in-fact" contracts. It has repeatedly held that its jurisdiction over contract claims includes "implied-in-fact" contracts but not those "implied-in-law". *Northwest Publications Inc.* v. *United States,* 253 F.Supp. 829 (D.D.C. 1966).

Therefore, petitioner Stencel's claim is a tort claim for money damages resulting from the negligence of the United States in providing defective specifications, requirements or components to Stencel. As a result of this negligence of the Government to Stencel, petitioner may be held liable to Donham. Stencel seeks indemnity from the Government for damages it may suffer as a result of the Government's negligence to it.

B. *Petitioner's Claim Is Covered by the Broad Language of the Waiver in the FTCA and Is Not Excluded by Any of the FTCA's Exceptions.*

The first step in the process of determining whether the Government's waiver of sovereign immunity covers Stencel's claim is to examine the FTCA's language of waiver. As this Court stated it in *Yellow Cab* printed here with the Court's original emphasis:

> The issue here is whether the Act also covers claims for contribution which would be due from the Government if the Government were a private individual.
>
> On its face the Act amply covers such consent. Section 410(a) waives immunity from suit on—"*any claim* against the United States, for money only, accruing on and after January 1, 1945, *on account of* damage to or loss of property or *on account of* personal injury or death *caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury, or death in accordance with the law of the place where the act or omission occurred.* Subject to the provisions of this title, *the United States shall be liable in respect of such claims to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances, except* that the United States shall not be liable for interest prior to judgment, or for punitive damages . . . ."

340 U.S. at 548.

The breadth of this language includes a claim for indemnity inasmuch as it does not require that the injury involved be the claimant's—only that the "United States,

if a private person," be liable to the claimant.[2] As was the case in *Yellow Cab,* the injuries here were to a third party to whom the claimant was or may be liable. Petitioner Stencel's indemnity claim clearly fits within the language of the waiver of sovereign immunity granted by Congress and is consistent with this Court's basic rule that the waiver be interpreted liberally.

The second step in the process is to determine whether the exceptions of the Tort Claims Act exclude petitioner's claim. None of the thirteen statutory exceptions to the Federal Tort Claims Act applies to petitioner's claim. 28 U.S.C. §2680. In holding that a claim of contribution is within the waiver contained in the Federal Tort Claims Act, this Court said: "Section 421 lists 12 classes of claims to which the waiver shall not apply, but claims for contribution are not so listed." 340 U.S. at 548. Similarly, none of thirteen present exceptions list or mention the other form of third-party tort claims: indemnity. The Court's basic rule that the exceptions of the FTCA be narrowly construed also supports the conclusion that none of the exceptions apply here. 340 U.S. at 548 n.5.

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[2] The law of Missouri would imply a contract of indemnity between the United States and Stencel under the facts of this case, as alleged in petitioner's cross-claim. See, *Feinstein* v. *Edward Livingston & Sons, Inc.*, 457 S.W.2d 789 (Mo. 1970); *Kansas City S. Ry.* v. *Payway Feed Mills, Inc.*, 338 S.W.2d 1 (Mo. 1960); *Western Casualty & Surety Co.* v. *Shell Oil Co.*, 413 S.W.2d 550 (Mo. App. 1967). It is also clear that Missouri law does not require liability of the indemnitor to the injured party. *State ex rel. Laclede Gas Co.* v. *Godfrey*, 468 S.W.2d 693 (Mo. App. 1971); *McDonnell Aircraft Corp.* v. *Hartman-Hanks-Walsh Painting Co.*, 323 S.W.2d 788 (Mo. 1959). However, the ruling of the court below mooted the question of what the state law was by deciding that state law was inapplicable.

C. *There Is No Evidence That Congress Did Not Intend to Bring Claims for Indemnity Such As Petitioner's Within the FTCA. On the Contrary, There Is Evidence of Affirmative Congressional Intent to Include Such Claims.*

The third step of the process is to determine whether there is evidence that Congress did not intend to bring the claim within the purview of the Act. There is no such evidence with regard to a claim for indemnity such as Stencel's. The absence of such evidence is sufficient to imply that Congress intended inclusion of Stencel's claim pursuant to application of this Court's basic rule of liberally construing the waiver.

Three pieces of evidence, however, indicate an *affirmative* intent to include claims similar to Stencel's within the FTCA. This evidence is drawn from the legislative history of the FTCA and, when taken together reveals that Stencel's claim falls clearly within Congress' intent. Generally, the legislative history of Congressional efforts to pass a tort claims act reveal an evolution from a particular to a general waiver. Most of the particular claims allowed in the early bills therefore must have been intended to fall within the more general waiver subsequently enacted.

In H.R. 2285, 70th Congress, 1st Session, which was passed by both the House and the Senate but suffered a pocket veto, the Congress sought to impose on the Government liability for personal injury:

> if caused by the negligence or wrongful act or omission of any officer or employee acting within the scope of his office or employment, or if attributable to any defect or insufficiency in the machinery or other materials due to any such negligence or wrongful omission.

H.R. Rep. No. 286, 70th Cong., 1st Sess. 5 (1929).

Congress clearly intended to cover personal injury resulting from the creation of defective machinery through the negligence of a government employee. Here, petitioner, in its cross-claim, contends that some government employee(s) were negligent in providing defective specifications, requirements, or components which created the defect for which Stencel may be held liable to Donham.

Thus Stencel's underlying claim was considered valid by Congress. The claim's validity is not affected by the fact that it is brought as an indemnity action for injuries to a third person. Stencel, in this respect, is a joint tortfeasor (albeit a passive one) with the United States. The second relevant passage from the legislative history was cited for its pertinence and quoted in *Yellow Cab*:

> "Section 403 of the Senate bill provided for a proportionate liability of the United States where a Government employee was a joint tort-feasor with someone else. This provision is not contained in the recommended bill *and in cases involving joint tort-feasors the rights and liabilities of the United States will be determined by the local law.*" [Emphasis supplied.] H.R. Rep. No. 2245, 77th Cong., 2nd Sess. 12.
>
> This recognizes that with the provision for proportionate liability eliminated, as is still the case, the immunity of the United States should be considered as waived in relation to the Government's rights and liabilities in cases involving joint tort-feasors.

340 U.S. at 551 n.8.

The third piece of evidence from the legislative history is of a more general nature. The various tort claim bills,

prior to the FTCA which was finally enacted, spoke in terms of waiving the Government's liability for acts of "negligence". The FTCA, as enacted, placed no such restriction on allowable tort claims. Rather, the Congress engrafted exceptions onto the Act which prohibited recoveries for acts performed with "due care" (Exception "a" in Section 421) or for the intentional torts (listed in Exception "h" of Section 421 of the original Act). It is clear that Congress had extensive knowledge of the law of torts and, therefore, it must be presumed that Congress intended that the Government be liable for all types of tort actions then in existence other than those specifically excepted. Tort indemnity, which was an established tort concept,[3] must, therefore, have been intended to be allowed.

Taken together, these three pieces of legislative history show that: (1) the gravamen of Stencel's claim was considered by the Congress and allowed; (2) the fact that the action is by a third-party joint (albeit passive) tortfeasor does not bar, nor affect the validity of, the underlying claim; and, (3) that tort indemnity must have been intended to have been included by Congress in its waiver.

D. *No Remedy Other Than That Provided by the FTCA Is Available to Compensate Petitioner for the Damages Which Result From the United States' Negligence to Petitioner.*

This Court's concern whether or not an alternative remedy is available to a claimant is important in this case. For example, in *Feres* v. *United States,* 340 U.S. 135 (1950), this Court found significant the fact that the serviceman was provided an ample, quick, and sure means of recovery

[3] In *United States* v. *Standard Oil Co. of Cal.*, 332 U.S. 301 (1947), this Court appeared to concur in the Government's contention that indemnity was "a well-settled concept of legal liability . . ." 332 U.S. at 315.

and that Congress' failure to adjust the Federal Tort Claims Act and the military compensation system must have meant that Congress did not intend the serviceman to have a Federal Tort Claims Act remedy. No such situation pertains in this case since no alternative remedy is provided to petitioner.

The Court of Claims Act does not provide a remedy to petitioner, as the United States Court of Claims has repeatedly interpreted the Court of Claims Act to exclude implied-in-law contracts of indemnity. No other statutes confer remedies for the Government conduct alleged in the case. Petitioner finds itself in virtually the same position faced by the joint tortfeasor of the Government in the *Yellow Cab* case. Petitioner believes that the following passage from that case is even more compelling where, as here, the petitioner is only a passive joint tortfeasor seeking indemnity. The Court stated with regard to contribution:

> Of course there is no immunity from suit by the Government to collect claims for contribution due it from its joint tortfeasors. The Government should be able to enforce this right in a federal court not only in a separate action but by impleading the joint tortfeasor as a third-party defendant. See, 3 Moore's Federal Practice (2d Ed. 1948) 507 *et seq.* It is fair that this should work both ways. However, if the Act is interpreted as now urged by the Government, it would mean that if an injured party recovered judgment against the Government, the Government then could sue its joint tortfeasor for the latter's contributory share of the damages (local substantive law permitting). On the other hand, if the injured party recovered judgment against the private tortfeasor, it would mean that (despite local substantive law favoring contributory liability) that an individual could not sue the

> Government for the latter's contributory share of the same damages. Presumably, the claimant would be relegated to a private bill for legislative relief. Such a result should not be read into this Act without a clearer statement of it than appears here.

340 U.S. at 551-52.

Thus, if Stencel's indemnity claim is barred, Stencel will be left without remedy or compensation for the United States' negligence. Petitioner's only recourse will be to seek the "grace" of Congress to compensate it for the loss it suffered as a result of the United States' negligence. It is difficult to believe that Congress intended such a result.

III.

The Court Below in Rejecting Petitioner's Claim for Indemnity Against the United States, Because of a Finding That Such Claims Are Based on Relationships Which Make Application of State Law Inappropriate, Has Reached a Conclusion in Direct Conflict With the Clear Language and Purpose of the Federal Tort Claims Act That the United States Shall Be Liable to the Same Extent as a Private Individual Under Similar Circumstances.

The decision of the court below erred in attempting to extend the *Feres* case to this case. Ignoring this Court's reasoning in interpreting the FTCA and applying its waiver of sovereign immunity, the court below created an "appropriateness" test for determining whether the FTCA applied to petitioner's claim. This test and the result reached by its application in the court below are in direct conflict with the mandate of the FTCA and the decisions of this and other courts.

A. *The Court Below Erred in Attempting to Extend Feres to This Case Because the Claim Rejected by This Court in Feres Bears No Relationship to Petitioner's Claim.*

This Court, in *Feres,* held that the United States is immune from suit by an on-duty serviceman based on injuries sustained incident to his service. The court below stated:

> In our view, the rule adopted in *Feres* serves to bar the serviceman's claim for injuries whether asserted directly by him or asserted by one seeking restitution through a tort indemnity theory.

536 F.2d 765 at 770 (A. 44a). This conclusion of the court below fundamentally mistakes both the petitioner's claim and the claims rejected in *Feres.* An examination of the rationales that support the *Feres* decision show that the claims asserted in that case bear no relationship to petitioner's claim.

The *Feres* case sets out a number of rationales in support of its decision. They are: (1) the unfairness that a serviceman's action should turn on the vagaries of state law over which he has no control since he is placed there by orders, 340 U.S. at 143; (2) the lack of time and money and the difficulty of procuring witnesses on the part of a serviceman in bringing a suit, 340 U.S. at 145; (3) the fact that the serviceman had an ample, quick and certain remedy in the form of the Military Compensation Act, 340 U.S. at 145; and (4) the effect of such suits on "military discipline." See, *United States* v. *Brown,* 348 U.S. 110, 112 (1954). It is clear that these rationales bear little relevance to either the Stencel-Donham or Stencel-United States relationships involved in this case.

Whatever unfairness there may be in having a serviceman's action depend on the vagaries of state law, it has no applicability to the Stencel-United States relationship. As a manufacturer of products, petitioner is resigned to having claims turn on the law of the various states into which its products flow. Certainly, the United States suffers no unfairness, for it chooses where its equipment is used. As the Court stated in *Feres*:

> That his tort claims should be governed by the law of the location where he has elected to be is just as fair when the defendant is the Government as when the defendant is a private individual.

340 U.S. at 143.

Most importantly, however, the terms of the FTCA itself subject the United States to the "vagaries" of state law.

Whatever difficulties the serviceman may have in bringing suit, no such problems attach to petitioner's claim. The *Feres* rationales are clearly not applicable to petitioner's claim as Stencel has no choice but to expend its resources in defense of Donham's action which remains pending in the District Court. For that matter, denying petitioner's claim does nothing to protect the serviceman's resources for he has already chosen to sue petitioner Stencel and that action will remain unaffected whatever the outcome here.

The fact that the serviceman has an ample, quick and certain remedy against the United States does not affect Stencel. Whatever the serviceman's remedy under the military compensation system, it is not available and provides no relief to Stencel. If petitioner's claim is denied, petitioner is left remediless against the party most responsible for the accident, the United States. If this rationale is meant to preserve the systemic integrity of the

compensation scheme, petitioner suggests that this system's integrity is skewed the moment the serviceman brings suit against petitioner or someone in a like position.

The military discipline rationale does not apply to petitioner's claim. Petitioner's claim does not in any way depend on the actions, inactions, or orders of Donham's commanding officers. To the extent that in similar third-party actions against the Government, such orders might be relevant in another case, two things should be understood. First, if those orders were the proximate cause of the serviceman's injury, a non-Government defendant would raise these matters as a defense to causation. Thus, even if the Government is immune from suit, the military discipline rationale would be disrupted when these matters are raised and explored in the course of defending against the serviceman's suit. Second, assuming the Government is not immune to a third-party's claims pursuant to the *Feres* exception, the Government would still be protected under the discretionary function exception. While petitioner's claim does not turn on any orders or action of Donham's superiors, in a case where the claim is based on such orders or actions, the discretionary function exception is designed to protect the Government's interest in such important decision-making.

None of the rationales that support that decision would be furthered, even indirectly, by extending the *Feres* decision to third-party suits for indemnity.

The Court below stated that to permit petitioner's claim would be to allow the serviceman to do indirectly what he is forbidden to do directly. This is an inaccurate statement of the case. Donham will proceed against Stencel in any case and must prove certain facts establishing liability on the part of Stencel. Any attempt by Donham to prove negligence on the part of the United States would be

irrelevant to his case. Stencel, on the other hand, in its indemnity claim, will seek to establish a different set of facts which would constitute negligence of the Government with regard to Stencel, which negligence caused Stencel's liability to Donham.

These are two separate causes of action, dependent on different sets of facts, different legal theories, different acts of negligence, and may be tried to different triers-of-fact. Thus, these two actions have a number of possible outcomes: (1) Donham could fail to prove any liability on the part of Stencel; (2) Donham could recover against Stencel on counts for which indemnity against the Government does not lie; (3) Donham could recover against Stencel, but Stencel might be unable to prove a set of facts which would give rise to indemnity; (4) Donham could recover against Stencel on the basis of its negligence to him, and Stencel could recover from the United States on the basis of its negligent conduct to Stencel. In only one of the four examples set out above would the United States even indirectly pay Donham's damages. In that example, the United States' liability would not be the result of Donham's proof in his action against Stencel, but as the result of what Stencel proves in its action against the United States.

The *Feres* decision therefore, is not applicable to this case and should not be extended to bar petitioner's claim. None of the rationales that underlie that decision have any bearing on the relationship between the United States and Stencel nor would they, in any way, be furthered by barring Stencel's claim. The claim of Donham against petitioner and petitioner's claim against the United States are independent causes of action dependent on different legal theories, acts of negligence, and sets of facts to be proven. This is not a mechanism intended to allow Donham to

recover from the Government. Rather, it is Stencel which seeks a remedy for damages caused by the Government's negligence to it. Donham's only relevance to this action is that payments to him may constitute an element of petitioner's damages. The Government's possible liability is irrelevant to Donham's claim against Stencel and Donham is irrelevant to Stencel's claim against the Government.

The extension of *Feres* would infringe the basic rule that the waiver of sovereign immunity must be liberally construed, especially where the claimant would be left remediless against The United States. If *Feres* be viewed as an exception to the broad waiver of sovereign immunity contained in the FTCA, it should not be extended to Stencel's claim since, as with all other exceptions to the FTCA, it must be narrowly construed.

B. *The Application by the Court Below, of an "Appropriateness" Test Is Erroneous Because It Is Contrary to the Purpose, Language, and Nature of the Congress' Waiver of Sovereign Immunity in the FTCA.*

The court below found in this Court's *Feres* decision a test for the applicability of the FTCA whether the application of state law would be appropriate. 536 F2d at 769 (A. 41a). The court found that, since the two relationships —serviceman-Government and Government-military contractor—were federal in nature, it would be *inappropriate* to apply state law. Therefore, the court below concluded, the FTCA does not cover Stencel's claim.

As support for its decision, the court below relied on language in *United States* v. *Standard Oil Co.*, 332 U.S. 301 (1947) which stated that the serviceman-Government relationship was federal in nature and should be governed by federal authority. In that case, the Government was

seeking indemnity from a private third-party for medical expenses paid by the United States to a serviceman whom the third-party had negligently injured. The government's position was that a federal rule of indemnity should be applied. In rejecting the Government's position, this Court's essential holding was that Congress has the power to create causes of action and to assign the law applicable to them. In its concluding paragraph this Court stated:

> [T]he United States has power at any time to create the liability. The only question is which organ of the Government is to make the determination that liability exists. That decision, for the reasons we have stated, is in this instance for the Congress, not for the courts. Until it acts to establish the liability, this Court and others should withhold creative touch.

332 U.S. at 316-317.

The *Standard Oil* case was decided before the effective date of the FTCA. Through the FTCA, Congress exercised its power and established the liability of the United States to causes of action in tort. Congress also mandated that the extent of the Government's liability shall be determined in accordance with state law, and further specified which state law would be applicable.[4] The thrust of the *Standard Oil* decision was that Congress, and only Congress, had this power. The corollary of the *Standard Oil* decision in this

[4] There is no doubt that the Act commands the application of state law. Even the court below agreed that:

> Where the United States authorizes suit under the FTCA, its liability is determined by the law of the place where the act or omission occurred to the same extent as a private defendant. 28 U.S.C. §1346(b)

536 F.2d at 769. (A. 41a).

case is that once Congress explicitly exercises its Constitutionally mandated power, the exercise must be honored by the courts. This the court below refused to do and was seriously in error in departing from the express command of Congress.

In this respect, the *Feres* decision did not hold that the FTCA does not cover an on-duty serviceman's claim against the United States *because* it would necessitate application of state law. As discussed above, the Court's decision in *Feres* was predicated on the conclusion that Congress did not intend that on-duty servicemen would be within the purview of the FTCA. This Court merely viewed the application of state law as an anomalous side effect of holding the FTCA applicable to claims of on-duty servicemen against the Government. Said the Court:

> It would hardly be a rational plan of providing for those disabled in service by others in service to leave them dependent upon geographic considerations over which they have no control and to laws which fluctuate in existence and value.

340 U.S. at 143.

Yet, the Court below has turned this anomalous side effect into a test for determining the applicability of the Federal Tort Claims Act. The Court below said:

> Stencel's claim against the United States rests upon two basic relationships—first, the military relationship between Captain Donham and the United States, and second, the military-contractual relationship between the United States and Stencel. In order to justify Stencel's action against the United States, we must infer that Congress in the FTCA intended that state

law apply to situations arising out of these two relationships.

536 F.2d at 769 (A. 41a).

Finding these relationships to be "governed exclusively by federal law", the court below found that Congress did not intend to permit this type of indemnity claim under the FTCA.

The irony of this "appropriateness test" is that many cases—specifically United States-Government contractor cases sounding in tort—involve the "federal relationship" found in this case. What is to constitute a federal relationship in other cases will be less clear. Yet the conclusion of the court below is that the presence of a federal relationship bars applicability of the FTCA is in clear contradiction to the holding in the *Rayonier:*

> [T]he very purpose of the Tort Claims Act was to waive the Government's traditional all-encompassing immunity from tort actions and to establish novel and unprecedented governmental liability.

352 U.S. at 319.

Given that every suit under the Federal Tort Claims Act involves novel and unprecedented liability and many suits involve a federal relationship, where does the "appropriateness" test leave claimants? Must a claimant prove that his relationship to the Government is not a federal relationship? Are federal relationships and non-federal relationships to be added up and balanced, and the FTCA to be held inapplicable where there are more of the former than the latter?

If an Army truck had negligently collided with one of petitioner's trucks while the latter was delivering spare parts to an Army base pursuant to a Government contract, would not the "federal relationship" be the same as the one in the case at bar? Doesn't the appropriateness test lead to the conclusion that the Government can commit torts against government contractors with immunity? Is this what Congress intended?

Petitioner's position is both simple and consistent with the clear language of the FTCA. To the tortious relationship between Stencel and the United States state law must be applied pursuant to Congressional command in the FTCA. Under the "appropriateness" test, the alternative is to leave Stencel and others similarly situated, remediless and uncompensated for the negligence of the United States to them.

C. *The Decision of the Court Below Is Contrary to Decisions of This Court and a Majority of the United States Court of Appeals.*

This Court's decision in *Weyerhaeuser S.S. Co.* v. *United States,* 372 U.S. 597 (1963), held that the Federal Employees Compensation Act's (FECA) exclusive liability provision did not bar recoveries against the United States by third persons held liable for injuries to government employees. The FECA's exclusive liability provision has the same legal effect on direct suits by Government employees against the Government as does the *Feres* decision on direct actions by servicemen. Both remove the Government's liability to its employees (civilian and military).

In the *Weyerhaeuser* case, the Court decided to uphold a one hundred year old divided damages rule against the Government pursuant to the Public Vessels Act, 43 Stat. 112, 46 U.S.C. §781 *et seq.,* which the Court stated:

"was intended to impose on the United States the same liability . . . as is imposed by admiralty law on the private shipowner. . . ." [citation omitted].

372 U.S. at 600. The Court held that the exclusive liability provision had no effect because the hundred-year-old damages rule did not require underlying liability of the United States to the injured employee. The *Weyerhaeuser* decision is closely analogous to the present case. Here the Government's sovereign immunity was waived by the FTCA intending to make the liability of the United States the same as the applicable state law would impose on a private individual. As it happens, Missouri law does not require underlying liability of the United States to its employee as a prerequisite to the recovery of indemnity. Hence the effect of *Feres* (removing the underlying liability) should be no greater than the effect of the FECA exclusive liability provision and recovery should be allowed here as it was there.

That the Court intended application of this reasoning in cases involving state law pursuant to the FTCA is clear from this Court's decision during the same term in *Treadwell Construction Co.* v. *United States*, 372 U.S. 772 (1963). *Treadwell* was a non-admiralty case where a third-party sought indemnity from the United States pursuant to the FTCA for injuries suffered by a Government employee. Since the decision of the Third Circuit, *Drake* v. *Treadwell Construction Co.*, 299 F.2d 789 (3d Cir. 1962), was predicated on the inapplicability of the FTCA by virtue of the exclusive remedy provision of the FECA, the Court, vacating and remanding, in light of *Weyerhaeuser*, must have intended the application of state law pursuant to the FTCA.

The United States Courts of Appeal for the Fifth, Ninth, Tenth, and D.C. Circuits[5] have all looked to state law to determine whether claims for contribution or indemnity should be allowed despite the absence of the United States' underlying liability to its employees. While the Courts in each of these cases rejected the indemnity and contribution claims, they all did so on the basis of *state* law.

In these four cases, the legal theory applied by the four Circuits was both logical and simple. The actions for indemnity and contribution were brought pursuant to the Federal Tort Claims Act. *United States* v. *Yellow Cab Co.*, 340 U.S. 543 (1951). Neither the FECA exclusive liability provision nor *Feres* barred such claims at the threshold. The courts then looked to the applicable state law to determine whether, under like circumstances, contribution or indemnity would lie against a private person. If, but only if, the state law (as found or predicted) required underlying liability of the indemnitor to the injured party as a prerequisite to indemnity or contribution would the claim be barred. These courts looked to FECA or *Feres* only to determine that there is no underlying liability of the United States to its injured employees. Where state law does not require underlying liability, the claim for indemnity or contribution must lie against the United States.

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[5] The decisions are: *Certain Underwriters at Lloyd's* v. *United States*, 511 F.2d 159 (5th Cir. 1975); *Barr* v. *Brezina Construction Co.*, 464 F.2d 1141 (10th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1972); *Murray* v. *United States*, 405 F.2d 1361 (D.C. Cir. 1968); *General Dynamics Corp.* v. *United States*, 535 F.2d 489 (9th Cir. 1976). Discussion of these cases can be found in the Petition at pp. 9-11.

Two other Circuits[6] have announced similar results in analogous cases. These two cases involved indemnity claims brought pursuant to the FTCA and Suits in Admiralty Act. The Sixth Circuit held that *Feres* did not bar third-party indemnity claims against the United States arising out of suits by injured servicemen. The Fourth Circuit rejected the applicability of the FECA exclusive liability provision as a bar to such indemnity claims by third persons. The claims were ultimately decided on the basis of applicable admiralty law.

Thus the decision of this Court and a majority of the United States Courts of Appeal have held that the FTCA applies to third-party claims for indemnity and contribution against the Government arising out of injuries to Government employees. The clear weight of decisional authority supports petitioner's conclusion that its indemnity claim against the Government is properly brought pursuant to the FTCA.

These decisions recognize the exercise of Congressional will that the Government may be sued in indemnity and contribution. They honor the Congressional command to apply state law. They follow the traditional rules of construction and the approach taken in the earliest decisions of this Court interpreting the FTCA that the waiver of sovereign immunity is to be liberally construed.

Petitioner urges that the approach taken by the court below is contrary to these principles and these decisions, and that the decision of the court below should therefore be reversed.

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[6] The decisions are: *Wellington Transportation Co.* v. *United States*, 481 F.2d 108 (6th Cir. 1973); *Wallenius Breman G.m.b.H.* v. *United States*, 409 F.2d 994 (4th Cir. 1969) *cert. denied*, 398 U.S. 958 (1970). Discussion of these cases can be found in the Petition at pp. 11-12.

CONCLUSION

The judgment of the court below should be reversed and the cause remanded with instructions to deny the motion of the United States to dismiss the cross-claim of petitioner for indemnity against the United States.

Respectfully submitted,

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December 30, 1976

Affidavit of Service

I, Thomas J. Whalen, being over the age of 18 years, a member of the firm of Condon & Forsyth, hereby certify that I have this 30th day of December, 1976, served three copies of the foregoing Petitioner's Brief upon Respondent United States of America, by mailing copies thereof to its attorneys of record in sealed envelopes, with air mail postage prepaid, deposited in The United States General Post Office, located at 33rd Street and 8th Avenue, New York, New York 10001, and addressed as follows:

Solicitor General
Department of Justice
Washington, D.C. 20530

.....

THOMAS J. WHALEN

Sworn to before me this
30th day of December, 1976.

.....

Notary Public